LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 15 1952
JOHN T. DOWLING, Clerk

No. 38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner

vs.

H. B. ZACHRY COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

ALLEN WOOD
Petroleum Tower,
Corpus Christi, Texas

SIDNEY A. CALLENDER,
CHARLES E. JOHNSON,
Transit Tower,
San Antonio, Texas

S. DEAN HEATHERLY,
First National Building,
Austin, Texas

Attorneys for Respondent

Southern Printing Company, Inc., 307 West 6th Street, Austin, Texas

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	1
STATUTES INVOLVED	3
REGULATIONS INVOLVED	4
STATEMENT	6
SUMMARY OF ARGUMENT	
I	15
II	16
III	17
IV	18
V	27
VI	31
VII	33
ARGUMENT	
I	34
II and III	39
IV	47
V	61
VI	66
VII	68
CONCLUSION	73
SIGNATURES OF COUNSEL	73
APPENDIX	74
Legislative History	74
Regulations Involved	78

INDEX OF AUTHORITIES

	Page
Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S. Ct. 565	27, 42, 62
Banker v. Jefferson County Water Control and Improvement District No. 1, 277 S.W. (2d) 130	10
Borden Co. v. Borella, 326 U.S. 679, 65 S.Ct. 1223	22, 55
Chambers Construction Company v. Mitchell, 233 F. (2d) 717	31, 66
City of Wichita Falls v. Lipscomb, 50 S.W. (2d) 867	10
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201)	3, 74
Hodge v. Lower Colorado River Authority, 163 S.W. (2d) 855	10
Huke v. Ancilla Domini Sisters, 267 F. (2d) 96	19, 21, 50, 57
Juarez v. Kennecott Copper Corporation, 225 F. (2d) 100	18, 21, 49
Karling v. Lower Colorado River Authority, 303 S.W. (2d) 495	10
Kent Products, Inc. v. Hoegh, 245 Iowa 205, 61 N.W. (2d) 711	72
Kirschbaum v. Walling, 316 U.S. 517, 62 S. Ct. 1116	20, 52
Lower Nueces River Water Supply District v. Cartwright, 274 S.W. (2d) 199	9
Mitchell v. Bland, 241 F. (2d) 808	33, 69
Mitchell v. Chambers Construction Company, 214 F. (2d) 515	31, 66
Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 75 S. Ct. 860	27, 34, 62

	Page
Mitchell v. Hodges Contracting Company, 238 F. (2d) 380	33, 69
Mitchell v. Jaffe, 261 F. (2d) 883	50
Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 79 S. Ct. 260	27, 62
Mitchell v. Moore, 241 F. (2d) 249	18, 21, 49, 55
Mitchell v. Zachry, 127 F. Supp. 377	14, 70
McComb v. Farmers Reservoir & Irrigation Co., 167 F. (2d) 911, aff'd, 337 U. S. 755, 69 S. Ct. 1274	21, 54, 61
McComb v. Super-A Fertilizer Works, 165 F. (2d) 824	21
McLeod v. Threlkeld, 319 U.S. 491, 63 S. Ct. 1248	45, 54
Murphey v. Reed, 335 U.S. 865, 69 S. Ct. 105	29, 64
Part 776, Tit. 29, Labor c. V, Wage and Hour Division, Department of Labor, Sections 776.0 to 776.30 of the Code of Federal Regulations, as amended (3 CCH L.L.R., par. 24,102	4
Reynolds v. Salt River Valley Water Users Ass'n., 143 F. (2d) 863, cert. den. 323 U.S. 764, 65 S. Ct. 117	61
Schroeder v. Clifton, 153 F. (2d) 385, cert. den. 328 U.S. 858, 66 S. Ct. 1351	20, 40
Southern Pacific Co. v. Gileo, 351 U.S. 493, 76 S. Ct. 952	29, 53, 64
10 East 40th Street Building, Inc. v. Callus, 325 U.S. 578, 65 S. Ct. 1227	19, 51
Tobin v. Pennington-Winter Construction Co., 198 F. (2d) 334, cert. den. 345 U.S. 915, 73 S. Ct. 494	40, 53, 62
Trisolini v. Meltsner, 23 N.J. 204, 92 A. (2d) 832	72
Van Name v. Federal Deposit Insurance Corp., 130 N.J. Eq. 433, 23 A. (2d) 261, aff'd. 132 N.J. Eq. 302, 28 A. (2d) 210	72

	Page
Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 1248	66
Warren-Bradshaw Drilling Co. v. Hall, 124 F. (2d) 42	16, 41
Willacy County Water Control and Improvement District No. 1 v. Abendroth, 142 Tex. 320, 177 S.W. (2d) 936	9
Zachry v. Mitchell, 262 F. (2d) 546	17, 47

No. 83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

vs.

H. B. ZACHRY COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

The statements in Petitioner's Brief concerning the opinions below and the jurisdiction of this Court are correct.

QUESTION PRESENTED

This is a Fair Labor Standards Act case which involves the question of coverage of employees of Respondent who constructed what is known as the Mathis Dam.[1] Unlike Petitioner, Respondent will

[1] The official name of the dam is the Wesley E. Seale Dam, but it is commonly known as the Mathis Dam, and both Petitioner and Respondent are referring to it by the latter name, as they have done throughout this litigation.

not seek to color the statement of the question in the case by any further recital of facts at this juncture.

In general terms, the question in the case is:

> Were Respondent's employees, while building the dam, engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended?

Under the controlling definition in the Act, Respondent's employees can be deemed to have been engaged "in the production of goods for commerce" only if they worked in a process or occupation "closely related" and "directly essential" to the actual physical manufacturing of such goods.

Hence, when consideration is had for the whole of the Act, the precise question in this case is:

> Were Respondent's employees, while building the dam, employed in a process or occupation *closely related* and *directly essential* to the actual physical production of goods for commerce?

If this Court determines that the activities of Respondent's employees were not "closely related" and "directly essential" to the production of such goods, the decision of the Court of Appeals for the Fifth Circuit was correct and should be affirmed. Contrariwise, if this Court finds that close relationship and direct essentiality were present, the Court undoubtedly will reverse the decision of the Court of Appeals and affirm that of the District Court.

Although the District Court found coverage, it exercised its discretion under Section 17 of the Act and issued an injunction applicable only to the Mathis Dam project, denying Petitioner's application for a blanket injunction. Petitioner assigned such denial on his cross-appeal to the Court of Appeals. Because of that Court's holding of no coverage, Petitioner's cross-appeal was not decided below, but Petitioner is now urging the point before this Court as a second question in this case (P. Br. 3). Since the District Court, in the exercise of its discretion, decided the point adversely to Petitioner, and since the Court of Appeals did not reach the question, Respondent is unable to see how the matter is a proper one for consideration or decision by this Court. However, in an endeavor to meet Petitioner squarely on all points presented in his Brief, regardless of their substantiality, Respondent will discuss the scope of the injunction near the end hereof.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201 *et seq.)* are as follows:

> "Sec. 7(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce *or in the production of goods for commerce* for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a

rate not less than one and one-half times the regular rate at which he is employed.[2]

"Sec. 3. As used in this Act—

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *closely related* process or occupation *directly essential* to the production thereof, in any State."

REGULATIONS INVOLVED

Part 776, Tit. 29, Labor c. V, Wage and Hour Division, Department of Labor, Sections 776.0 to 776.30 of the Code of Federal Regulations, as amended (3 CCH L.L.R., par. 24,102), provides, *inter alia*:[3]

"776.20(b). The Act's definitions do not, however, include as 'goods' such things as *dams*, river improvements, highways and viaducts, or railroad lines.

"776.17(a). The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope

---

[2] Absent an accompanying statement to the contrary, all italics herein have been added.

[3] These and other portions of the regulations are set forth in greater detail in the Appendix *infra*.

of its coverage with respect to employees (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on' goods for commerce. Some employees whose work might meet the 'necessary' test are now outside the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production. . . .

"776.17(b). The terms 'closely related' and 'directly essential,' are not susceptible of precise definition. . . . Not all activities that are 'closely related' to production will be 'directly essential' to it, nor will all activities 'directly essential' to production meet the 'closely related' test. . . .

"776.17(c). (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words 'directly essential' refer only to the relationship of the employee's *work* to production. Work 'directly essential' to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear on the other hand, that the criteria for determining whether a process or occupation is 'closely related' to production cannot be limited to those which show its closeness in terms of need or function. It may be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the *place* or the

time of its performance, or in terms of the *purposes* with which the activity is performed by the particular employer through the employee, or in terms of relative *directness* or *indirectness* of the activity's effect in relation to such production, or in terms of employment *within* or *without* the productive enterprise.

"(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activitiy; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business. Moreover, in some cases where particular work 'directly essential' to production is performed by an employer other than the producer, the degree of such essentiality may be a significant factor in determining whether the work is also 'closely related' to such production.

'"No one of the factors listed above is necessarily controlling, and other factors may assume importance." (Italics copied rather than supplied.)

STATEMENT

Petitioner's statement of the facts is so intertwined with his argument that it would indeed be

difficult to divorce the two and reply only to his statement. Rather than attempt any such tedious task of extrication, Respondent submits herewith its own statement, which also contains argument.

This is not an "in commerce" case. Rather, it is a "production of goods for commerce" case. In his Complaint, Petitioner twice alleged only that Respondent's employees were "engaged in the production of goods for interstate commerce" (R. 4). Nowhere in his pleading or elsewhere in this lawsuit has Petitioner contended that such employees were "engaged in commerce." In finding coverage, the District Court recognized that Respondent's employees admittedly "are not engaged in the actual movement of commerce *or in connection with the instrumentalities of such movement*," and that such coverage must be found, if at all, in the above-quoted portions of the Act which pertain to "production of goods for commerce," and, more particularly, in those portions which require findings of activities in a "*closely related* process or occupation *directly essential* to the production" of goods for commerce (R. 72-73). Hence, to reiterate what is implicit in the foregoing statement of the question in this case, the facts herein must be viewed and analyzed with the constant goal of ascertaining whether there existed between the activities of Respondent's employees and the ultimate production of goods for commerce those requisites of *close relationship* and *direct essentiality* which are imposed by the Act.

At the outset, let us start with the definite and undisputed fact that various and sundry types of goods are produced for commerce in the City of

Corpus Christi by various and sundry manufacturing concerns in that City. Let us also start with the certain fact that the concerns which produce such goods for commerce use water in their manufacturing processes. Petitioner did not need to make copious citations of gazetteers and similar works in his brief in order to show that industries of this type are located in the City of Corpus Christi. Neither did he need to cite a book called "Design and Control of Concrete Mixtures" to demonstrate that concrete is composed of cement and water, nor a tome entitled "Organic Coating Technology" to prove that paints sometimes contain water. Respondent humbly admits the elementary facts concerning water which are thus so erudítely established by Petitioner's cited authorities.

In addition, it is a further admitted fact that most of the industries in the City of Corpus Christi which produce goods for commerce, and which use water in so doing, purchase such water from the City.

With these facts constituting one end of the picture, let us now look at the other end—the only end which involved Respondent and its employees.

In 1955, as a result of competitive bidding, Respondent was awarded a contract to construct the Mathis Dam (Pl. Ex. 7).

Respondent's contract to construct the Dam was not with the City of Corpus Christi, and Respondent had no contractual relationship whatever with the City. Rather, Respondent's sole contract was with

the Lower Nueces River Water Supply District (Pl. Ex. 7). That District is a governmental agency, a body politic and corporate," (Article 8280-134(14), Vernon's Annotated Civil Statutes of Texas) which is entirely separate and apart from the City of Corpus Christi. Unlike the situation which exists is some states wherein a water district is merely an *alter ego* of a city or town, the Lower Nueces River Water Supply District and the City of Corpus Christi are "separate governmental agencies" (R. 29). As stated by the District Court (R. 45), "the boundaries of the district are not co-extensive with the city's."

The District's status as an independent agency of the State of Texas, and the Act creating it, were upheld and confirmed by the Courts of that State in *Lower Nueces River Water District v. Cartwright*, 274 S. W. (2d) 199 (writ refused, n. r. e.).[4]

[4] For whatever collateral light it might shed upon the problem at hand, agencies such as the Lower Nueces River Water Supply District, although often referred to as "municipal corporations" in the statutes creating them (such as Article 8280-134 V.A.C.S., referred to above) are, nevertheless, in the language of the Supreme Court of Texas:

> "not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law." *Willacy County Water Control and Improvement District No. 1 v. Abendroth*, 142 Tex. 320, 177 S. W. (2d) 936 (1944).

Holdings such as this have primary importance in the hornbook distinction between "governmental" and "proprietary" functions. Thus, under the decisions of the Courts of Texas, a city which constructs a reservoir or otherwise engages in the water business is performing a "proprietary" function which makes it subject to the application of

Pursuant to its statutory powers, the District entered into a contract with the City of Corpus Christi by which the District would build the Mathis Dam and would sell the water impounded thereby to the City (R. 25-27; Pl . Ex. 1).[5]

The Mathis Dam was built on the Nueces River, which is situated entirely within the State of Texas (R. 30). The Dam forms no part of any navigation or flood control project; it produces no hydro-electric energy (Pl. Ex. 7). No federal funds were used in its construction. Rather, the Dam is being paid for

---

principles pertaining to municipal and other corporations, whereas an agency such as the Lower Nueces River Water Supply District which constructs a reservoir and sells water is performing a "governmental" function and the situation is the same as if the State of Texas itself were engaged in such activities. *Hodge v. Lower Colorado River Authority*, 163 S. W. (2d) 855 (writ dismissed). See also *Banker v. Jefferson County Water Control and Improvement District No. 1*, 277 S. W. (2d) 130 (writ refused, n.r.e.); *Karling v. Lower Colorado River Authority*, 303 S. W. (2d) 495 (writ refused, n.r.e.); *City of Wichita Falls v. Lipscomb*, 50 S. W. (2d) 867 (writ refused).

[5] Under an applicable statute (Article 7880-4a V.A.C.S.), the District is entitled to sell water according to the following priorities:

"1st. Domestic and municipal use;

"2nd. Industrial use, other than the development of hydro-electric power;

"3rd. Irrigation;

"4th. Development of hydro-electric power;

"5th. Pleasure and recreation."

The statute further provides that: "Where the welfare of the district may require, the directors of such district may withdraw water from an inferior use and appropriate such water to a superior use, as hereinabove given discretionary preference."

by ad valorem taxes on property located within the District and by revenues from the sale of water to the City (R. 29-30).

Prior to Respondent's construction of Mathis Dam, the District owned another dam on the Nueces River, which impounded water for use by the City and which is referred to in the record as the "old dam" (R. 27-28).

The Mathis Dam is located downstream from the old dam about 1,300 to 1,500 feet (R. 45). The relative positions of the two dams are depicted in the photograph which is Plaintiff's Exhibit 5 (R. 27). When the reservoir behind Mathis Dam is filled, the old dam "will be inundated by the new lake" (R. 28).

From these facts, it might be concluded that Mathis Dam is merely an "improvement or replacement" of the facilities of the old dam. On the other hand, the decision to locate Mathis Dam at its existing site was an engineering one dictated entirely by technical reports as to the suitability of the site from a geographical and topographical standpoint, and entirely unaffected by the fact that the old dam was a few hundred feet upstream (R. 30-31). Indeed, the presence of the old dam appears to have been a costly nuisance, since provision had to be made to provide diversions of water from it while Mathis Dam was being constructed, to remove the upper portions of its embankment, and to excavate a partial breach therein (Pl. Ex. 7). In other words,

a new dam, built by totally "new construction," undoubtedly would have been located at the same site as Mathis Dam, regardless of the presence of the old dam, and probably could have been more easily and less expensively constructed if the old dam had not presented an impediment upstream (R. 30-31).

Thus, as far as any question of "new construction" versus "improvement or replacement" is concerned, the District Judge was most perceptive when he said that Respondent's construction of Mathis Dam was (R. 46):

> "by all practical considerations, as distinguished by [sic] technical conceptions . . . at once an improvement, a rebuilding and a new construction."

Certain it is that, despite Petitioner's efforts to erect a straw man to the contrary (P. Br. 11-13), Respondent places no especial reliance upon any supposed doctrine that construction activities automatically are exempt from coverage under the Act simply because they involve "new construction." On the other hand, even more certain is the fact that Petitioner can obtain no solace, and should secure no judgment, by his attempt to persuade the Court that "improvement or replacement," rather than "new construction" is involved herein. Probably, as found by the District Court, new and old construction are both involved. Definitely, however, the adjective attached to such construction should not be determinative of the ultimate decision herein.

The water impounded by Mathis Dam is discharged below the dam into the bed of the Nueces River and flows some 26 miles downstream to a treatment plant at Calallen, Texas, owned by the City (R. 29). After being treated at Calallen, the water travels an additional 16 miles (for a total journey of 42 miles from the Dam) to a point where it enters the City's water distribution system (R. 29). Once the water enters such system, it is sold by the City to the same types of customers that are found in any large municipality.[6]

Included among the customers are industrial plants, some of which produce goods for commerce. Direct evidence was introduced as to only one such customer (R. 35-36), and to shorten the record it was agreed that the City makes similar sales of water to various other industrial plants located in and near the City. (R. 36). None of the City's customers sells the water itself in interstate commerce (R. 36). Rather, in the words of the District Judge, the water generally "is used for cooling towers and engines and so forth" (R. 39).

The goods produced for interstate commerce by these industrial plants located in or near Corpus Christi—some 42 miles distant from Mathis Dam—are the only "goods" involved in this case. If Respondent's employees are covered by the Act, it is be-

[6] The City classifies these customers as residential, commercial, seasonal, hospitals, schools, churches, city and industrial (R. 32).

cause their activities miles away from the actual production of the goods were nevertheless of such nature that this Court can say and hold that they were "*closely* related" and "*directly* essential" to goods produced in the Corpus Christi area which use water as an incident of their production. For reasons set forth in detail below, the requisites of close relationship and direct essentiality are wholly lacking.

With respect to Petitioner's plea that this Court override the action of the District Court and grant a blanket injunction against Respondent, the facts are also simple and convincing. Respondent has completed approximately 1,200 construction jobs of varying kinds, with varying problems of coverage. The value of these jobs has been "in excess of three hundred million dollars" (R. 63). Despite this volume of work and the manifold problems of coverage, Respondent has been involved in court proceedings under the Fair Labor Standards Act only two times—in the case at bar and in a case in New Mexico some years ago where a complicated question of coverage was also involved, *Mitchell v. Zachry*, 127 F. Supp. 377 (R. 63). At no time has Respondent ever been sued by an employee for any alleged violation of the Act. (R. 63-64).

Neither Respondent nor its legal staff treats lightly the matter of coverage under the Act. On the contrary, in a vast majority of cases its legal staff has advised Respondent that its employees were

covered. Figures immediately prior to trial of this case were as follows (R. 59-62):

Year	Total Jobs	Value	Under the Act	Not Under the Act	Percentage Under the Act
1956	78	$34,352,000	74	4	94.9%
1957	74	$20,000,000	73	1	98.6%
1958 (to trial)	33	$23,097,000	31	2	93.1%
Total	185	$77,449,000	178	7	96.2%

Thus, the Mathis Dam job does not fit into any pattern of non-compliance by Respondent, or of refusal to recognize coverage. Rather, it is merely one of the extremely few recent jobs (3.8% of the total, or 7 out of 185 jobs) in which Respondent and its legal staff have not concluded that coverage exists. As will hereinafter be demonstrated by discussion of the authorities, the District Court could well have denied any injunction at all, even while finding coverage; but, in the exercise of its discretion, it saw fit to grant a limited injunction. Respondent respectfully submits that this Court should not disturb the exercise of such discretion, regardless of its final determination of the matter of coverage.

SUMMARY OF ARGUMENT

I.

Respondent, like the Court of Appeals, fully recognizes that coverage thereunder should be "determined by practical considerations, not by technical conceptions." Hence, Respondent joins with Peti-

tioner in urging that this Court decide this case upon the basis of practical considerations; but, for reasons pointed out below, Respondent suggests that Petitioner pays only lip service to such rule of decision, and that the arguments advanced by Petitioner are in fact far more technical than practical.

II.

In building Mathis Dam, Respondent's employees were not actually producing any goods for commerce. As stated in the above-quoted Regulation issued by Petitioner's Wage and Hour Division, a dam is not "goods" within the meaning of the Act. Upon the asserted analogy afforded by *Warren-Bradshaw Drilling Co. v. Hall*, 124 F(2d) 42 (a case which Petitioner did not even deign to cite before the Court of Appeals), Petitioner appears before this Court with the belated argument that the water impounded by the Dam is "goods" and that Respondent's employees "produced" such water by building the Dam (P. Br. 18, 60-66). Even if this strained "technical conception" is taken of the term "production," the evidence is undisputed that the water itself is not sold in interstate commerce (R. 36). To counter the record on this point, Petitioner is attempting to bring in by the back door another belated contention to the effect that the water becomes an ingredient of goods which are themselves produced for commerce. This contention is advanced dehors the record, with Petitioner himself admitting (P. Br. 66, n. 38) that "the evidence relating to this ground of coverage was not developed in the record of the instant case."

Hence, the Court of Appeals was eminently correct in its opinion herein when it succinctly described the issues in this case as follows (R. 93):

> "The Secretary concedes that the construction workers were not engaged 'in commerce.' If, therefore, his views are to prevail it must be on the basis of their being engaged 'in the production of goods for commerce.' Since obviously they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed 'in [a] closely related process or occupation directly essential to the production' of goods," *H. B. Zachry Co. v. Mitchell*, 262 F(2) 546 at 548-549.

III.

With Respondent's employees admittedly not being covered by the portions of the Act which refer to workers engaged "in commerce," it is pertinent to note the obvious fact that the "closely related" and "directly essential" requirements apply and delimit the scope of coverage only under the "production of goods for commerce" portions of the Act, and that no such statutory curtailment is placed upon coverage of those engaged "in commerce." Therefore, decisions pertaining to coverage of commerce itself, and of the instrumentalities thereof, must be applied with caution and discrimination in determining coverage of those engaged "in the production of goods for commerce," since the requisites

of close relationship and direct essentiality have been written by Congress into the latter type of determination, whereas no such statutory mandate attends the former.

IV.

1. Prior to 1949, the definition portion of the Act provided that employees were covered if they worked on the actual production of goods for commerce:

> "or in any process or occupation *necessary* to the production thereof, in any State."

2. In 1949, Congress deleted the "necessary" test and inserted the "closely related" and "directly essential" requisites which are now in the Act. In their statement, the House Managers who handled the Conference Committee report on the 1949 amendment made express reference to this change and stated that the intent of Congress in amending the definition was to narrow the coverage of the Act and to remove therefrom numerous local activities which had theretofore been ruled subject to the Act.[7] In the regulations quoted above, the Wage and Hour Division has also interpreted the 1949 amendment as being intended to narrow the scope of coverage in production for commerce cases. The amendment has been so construed by the Sixth Circuit in *Mitchell v. Moore*, 241 F(2d) 249, by the Tenth Circuit in *Juarez v. Kennecott Copper Corporation*, 225 F

[7] Pertinent portions of the House Managers' statement are set forth in the Appendix, *infra*.

(2d) 100, and by the Seventh Circuit in *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, as well as by the Fifth Circuit in the case at bar.

3. As contained in the Act, the terms "closely related" and "directly essential" must mean something in the chain of causation, and their meaning can only serve to lessen, rather than increase, the number of links in the chain to which coverage is applicable. Even under the old "necessary" test, this Court recognized in *10 East 40th Street Bldg., Inc. v. Callus*, 325 U. S. 578, 65 S. Ct. 1227, that:

> ". . . merely because an occupation is indispensable in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act . . . Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line."

Petitioner repeatedly tries to deprecate the application of the *Callus* case to a situation such as the one at bar, stating that the Fifth Circuit erred in following the reasoning of such case (P. Br. 16, 53-55). If the Fifth Circuit so erred, then the Sixth, Tenth and Seventh Circuits have likewise erred, since in the decisions last cited above each of those Courts leaned heavily upon the *Callus* case in deciding what was and was not "closely related" and "directly essential" to the production of goods for commerce.

4. In *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 1116, this Court said that the:

> "problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn."

While fixed points are lacking, numerous authorities lend aid in drawing the line, among which are:

(a) The legislative history of the 1949 amendment, including the Conference Committee report referred to above. In addition to repeated statements that the amendment was intended to narrow coverage, the report sets forth specific examples of prior decisions which in effect are overturned by the amendment. One such specific example is *Schroeder v. Clifton*, 153 F(2d) 385, *cert. denied*, 328 U. S. 858, 66 S. Ct. 1351. In that case, the employees quarried rock and transported it to a site where a dike was being constructed. The dike, would serve as a dam and would prevent wells which produced oil for commerce from being flooded. The activities of the employees in that case were at least as essential and as related to the production of goods for commerce as were the activities of Respondent's employees in the instant case, yet the Conference Committe stated in plain words that the Labor Department and the courts would no longer be able to hold the Act applicable in cases where the facts were similar to those in the *Schroeder* case, because such activities are not closely related and directly essential to the production of goods for commerce. If a situation such as that in the *Schroeder* case is

no longer covered by the Act, then most certainly it should not be held that the instant situation is so covered.

(b). Another case which the Conference Committee said would no longer represent the law is *McComb v. Super-A Fertilizer Works*, 165 F(2d) 824, where coverage had been held for employees of a fertilizer company which sold all of its fertilizers to farmers for use in sugar cane fields, with the cane thereafter being processed into raw sugar and sold in commerce. Under the 1949 amendment, such a situation will no longer be covered. Is the casual connection between the work of Respondent's employees on Mathis Dam and the production of goods for commerce in Corpus Christi any less remote?

(c) Also akin is *Mitchell v. Moore*, 241 F. (2d) 249, where the employees were engaged in manufacturing and processing livestock and poultry feed which was fed to animals and fowls that were sold and shipped in commerce. With appreciation of the limiting effect of the 1949 amendment, the Court held that close relationship and direct essentiality were lacking and that the employees were not covered. If, as held by the Court, remoteness was there present, is there not like remoteness in the case at bar?

(d) The same observations can also be made with respect to the "hospital cases," *Juarez v. Kennecott Copper Corporation* 225 F(2d) 100, and *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, where the

providing of hospital and medical care for workers directly engaged in the actual production of goods was held too remote for coverage.

(e) Another aid in drawing the line is afforded by this Court's logic in the *Callus* case, and especially in the distinction which the Court there made between its holding in that case and its holdings in *Borden Co. v. Borella*, 326 U. S. 679, 65 S. Ct. 1223, and *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 116. In the latter two cases, coverage was found for employees in two buildings which were owned and occupied for the primary purpose of serving commerce. On the other hand, in the *Callus* case this Court held that coverage did not exist in the case of an office building used generally by a diverse number of tenants in various kinds of businesses, including a few whose businesses were related to commerce. In so holding, the Court said:

> ". . . an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts."

Precisely parallel reasoning is applicaple here. If Respondent had built a dam which was to be used for the sole or primary purpose of impounding water for a concern or concerns engaged in the production of goods for commerce, it could with force be argued

that Respondent's employees were covered since the dam, like the building in the *Kirschbaum* and *Borden* cases, *supra*, would be intended to have, and would have, basic use in the production of goods for commerce.

However, the Mathis Dam is not such a dam, for it was not designed primarily to furnish water for industries producing goods for commerce. Rather, it, like the office building in the *Callus* case, was intended to serve and does serve a miscellany of water customers — residental, commercial, institutional, and municipal, as well as industrial (R. 32). The Trial Judge aptly described the purpose of the Dam when he said (R. 33-34):

> "Well, I think that it is admitted that the dam is to get adequate water supply, not only for Corpus Christi, but for the whole area . . . that is the advertised purpose, and we voted for it, to get an adequate water supply for this area, for our yards, our homes, our industries and other people that needed it, not only in the town, but in this area here."

To track and paraphrase this Court's language in the *Callus* case, a dam so intended for serving the usual miscellany of water users "has many differences in the practical affairs of life" from a dam intended to serve solely or primarily those engaged in the production of goods for commerce, "and the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts."

(f) Additional aids in drawing the line are afforded by the regulations of the Wage and Hour Division which are quoted above and are set forth in greater detail in the Appendix hereto. Among the factors there set forth as subjects for consideration in determining the relationship and essentiality of a particular activity are:

(i) Where, when and how the activity is performed in relation to the production to which it pertains.

(ii) Whether the activity is performed within or without the productive enterprise.

(iii) Whether its performance is with the primary view of aiding production or is for some different purpose.

(iv) How immediate or delayed is the activity's effect on production.

(v) The number and nature of any intervening operations or processes between the activity and the production.

(vi) And, in an appropriate case, the characteristics and purposes of the employer's business.

The effects of a consideration of these factors are obvious. In his brief, Petitioner has scoffed at Respondent's mention of the fact that the activities of the employees at Mathis Dam were 42 miles distant as a matter of geography, and several contracts distant as a matter of contractual connection, from the actual production of goods in Corpus Christi. According to Petitioner, these are "technical concep-

tions," deserving of no consideration (P. Br. 17-18, 56-60). In so arguing, Petitioner runs counter to his own regulations which say that "place" of performance of the activity is to be considered, and he also disregards this Court's statement in the *Callus* case that "'remoteness of a particular occupation from the physical process is a relevant factor in drawing the line." Most certainly remoteness in geography and in contractual connection are not decisive of this case, yet they are indeed relevant factors.

It will be most difficult for Petitioner to deny that each and every one of the above factors, contained and set forth in his own regulations, points to a decision of non-coverage in this case. Respondent is not in the business of producing goods for commerce; the activities of Respondent's employees were performed outside, rather than in, any productive enterprise. Such activities were not performed for the primary purpose of aiding industries which produce goods for commerce; rather, they were performed to aid in furnishing water to all residents of the Corpus Christi area, of which the producing industries form only a small segment. The activities had no immediate effect on the production of goods for commerce. Rather, such activities affect the production of goods only in the remote sense that, long after the activities were performed, production of goods is aided when a factory worker takes a drink of water or puts water in a boiler or cooling tower. Finally, there are indeed a large number of intervening operations or processes between the activities

performed by Respondent's employees and the eventual production of goods.

(g) All of these matters lead to one final consideration which is most practical and non-technical, to-wit: If remoteness is not present in the situation at bar, when, if at all, can remoteness—lack of close relationship and of direct essentiality—ever exist in a situation involving the supplying of water, some of which winds up being used by producers of goods for commerce? If coverage exists in this case, then in connection with the supplying of water the only non-covered activity seemingly would be the uttering of prayers for rain; and, if Petitioner's contentions in this case are sustained, his zeal may well come to encompass that activity.

As is said above, the terms "closely related" and "directly essential" must mean something with respect to the chain of causation, and their meaning can only serve to lessen, rather than increase, the number of links in the chain to which coverage is applicable. If Petitioner is correct in his contentions, then in connection with the supplying of water the entire casual chain is covered, and the terms so deliberately inserted into the Act by the 1949 amendment are rendered meaningless.

In this connection, it should not pass unnoticed that Petitioner seems to feel that some magic lies in the fact that water, rather than some other substance, is involved in this case. Is such a view practical, or is it not merely another of Petitioner's tech-

nical conceptions? Insofar as the tests of close relationship and direct essentiality are concerned, is water to be treated any differently than the feed involved in *Mitchell v. Moore* or the medical care involved in the hospital cases, *supra?* Does water stand in any higher status under the Act than feed or other substances? If these latter two questions are answered in the affirmative, as Petitioner would have this Court do, then such answers must be found other than in logic or in the terms of the Act itself.

V.

To analyze all of the dozens of cases cited by Petitioner would extend this brief unduly. Moreover, such case by case analysis is unnecessary, since in the main Petitioner relies upon *Mitchell v. C. W. Vollmer & Co.*, 349 U. S. 427, 75 S. Ct. 860; *Alstate Construction Co. v. Durkin*, 345 U. S. 13, 73 S. Ct. 565; and *Mitchell v. Lublin, McGaughy & Associates*, 358 U. S. 207, 79 S. Ct. 260, to carry his propositions. Respondent has no quarrel with those decisions, or with the principles enunciated therein.

At the outset of any analysis of these cases, note should be taken of the fact that all three are "in commerce" cases, rather than "production of goods for commerce" cases, *Vollmer* and *Lublin* being clearly so, and *Alstate* also being an "in commerce" case—a case involving an interstate highway—although production features were involved therein. To call these "in commerce" cases, as Respondent has done throughout this litigation, and as did the Fifth Circiut, is not to disparage them or to say that they are

wholly inapplicable to the case at bar. Contrary to the insinuations in Petitioner's Brief, neither Respondent nor the Fifth Circuit accorded the cases such cavalier treatment (P. Br. 9-10, 29-36).

Rather, Respondent has labelled *Vollmer*, *Alstate* and *Lublin* as "in commerce" cases for several reasons of clarity and convenience. As everyone realizes, the Act itself makes a distinction between "in commerce" situations and "production of goods" situations. Since the 1949 amendment, that distinction has been accentuated by the fact that the "closely related" and "directly essential" requirements were written into the law applicable to the latter type of situation, whereas no comparable language in the Act governs the former. In neither *Vollmer*, *Alstate* nor *Lublin*, therefore, did this Court pass upon, or have occasion to pass upon, the effect of the requirements of the 1949 amendment. With such being true, it cannot be accepted as gospel that whatever Petitioner or anyone else might read into this Court's rulings in those three "in commerce" cases must be, or should be, deemed applicable to production of goods cases generally or, in particular, to a production of goods case such as the one at bar in which need for interpretation and application of the "closely related" and "directly essential" tests is squarely before the Court.

Certainly, it would seem that the language in those cases concerning liberal construction of the Act and the use of practical considerations rather than technical conceptions is, and should be, applicable to all

types of cases arising under the Act, whether or not they are "in commerce" cases. Respondent has so accepted such language and has endeavored to analyze and submit this case in light thereof.

Certainly, also, full recognition must be had of this Court's holding in the *Vollmer* case and of its subsequent statement in the *Lublin* case concerning the supposed "new construction" doctrine. Perhaps when this Court referred in *Lublin* to "whatever vitality the 'new construction' doctrine retains after" *Vollmer* and *Gileo*,* it was merely softening the obsequies of a doctrine that is already wholly deceased. On the other hand, *Vollmer*, *Gileo* and *Lublin* were all "in commerce" cases, and in *Vollmer* the Court distinguished its holding therein from its earlier acceptance of the new construction doctrine in *Murphy v. Reed*, 355 U. S. 865, 69 S. Ct. 105, on the ground that the new construction work held exempt in the latter case was "not the improvement of a facility or instrumentality of interstate commerce."

Perhaps, therefore, this Court's rejection of the new construction doctrine applies only to cases "in commerce," and has no application to situations such as those in *Murphy v. Reed* and in the case at bar which do not involve the improvement of a facility or instrumentality of interstate commerce. In deciding the instant case, the Fifth Circuit so ruled, with an apparent eye to what this Court held in

---

* *Southern Pacific Co. v. Gileo*, 351 U. S. 493, 76 S. Ct. 952.

Murphy v. Reed and to what this Court said about such holding in the *Vollmer* case (R. 96-97). That Circuit's appraisal of those two cases was not without substance.

In any event, it seems foolish to speculate before the Bench of this Court as to what the Court might or might not have held in those cases, since this Court knows far better than counsel what it held and wherein, if at all, such holdings are pertinent to the "closely related" and "directly essential" tests to be employed in the case at bar.

The facts concerning the location of Mathis Dam and to its relationship to the "old dam" are undisputed and speak for themselves. Perhaps it is true, as Petitioner so vigorously argues in one of his several castigations of the Fifth Circuit, that calling the building of Mathis Dam "new construction" would avail Respondent naught. On the other hand, labelling the Dam an "improvement or replacement" also solves nothing, unless this case is to be decided by name tags rather than by practical considerations.

As is said above in Respondent's Statement, the District Judge probably was correct when he said that Mathis Dam is "at once an improvement, a rebuilding and a new construction." The problem at hand cannot be avoided or solved merely by affixing one or the other of those names to the Dam. Rather, the nature of the Dam and of its construction is significant only as it affords aid in determining

whether the requisites of "closely related" and "directly essential" exist. Since no such determination was required of the Court in *Vollmer*, *Alstate* and *Lublin*, it would appear that those decisions at most have only tangential bearing upon the instant case; but, except for this statement, Respondent will not undertake the presumptuous procedure of attempting to tell this Honorable Court what it held in those decisions and wherein, if at all, its holdings cut into the problem at hand.

VI.

In seeking certiorari, Petitioner asserted a conflict between the decision of the Fifth Circuit herein and the decisions of the Eighth and Tenth Circuits in the so-called *Chambers* cases, *Mitchell v. Chambers Construction Company*, 214 F(2d) 515, and *Chambers Construction Company v. Mitchell*, 233 F(2d) 717, and he continues to cite and rely heavily upon those cases in his brief. Neither of the *Chambers* cases should be deemed applicable or controlling herein.

In the first case, by the Eighth Circuit, the question of coverage was not decided and, while affirming on other grounds the refusal of the district court to grant an injunction, the Court merely said that it was "inclined to agree" with the Secretary's contentions on coverage.

In the second case, as stated by the Court of Appeals herein (R. 98), the Court "equated the new construction conception as to instrumentalities of

commerce . . . with construction of facilities to be used for production of goods, "without recognizing the two different bases of coverage and without any application to the latter situation of the tests of "closely related" and "directly essential" activities. In other words, that Court embraced Petitioner's contention that merely labelling something an "improvement or replacement" is enough to insure coverage, and that such a label suffices even though the case might be a production case rather than an "in commerce" one.

Moreover, the facts in the two *Chambers* cases are distinguishable from those at bar since both involved construction done on *water distribution systems*, rather than on facilities which result in the impounding of water that ultimately reaches a distribution system. As a result, the employees' activities in the *Chambers* cases pertained to the actual distribution of water to industrial plants, whereas in the instant case the building of Mathis Dam was far removed from the distribution systems of the City of Corpus Christi, and was even further removed from the delivery of water to industrial plants by the distribution systems. In addition, the construction contracts in those cases were with the cities which owned the distribution systems, and the work was directly performed for them, whereas in the instant case the construction contract was with the Nueces Water District, and the building of the dam for the District was only in an indirect sense work done on behalf of the City which owned the

distribution systems that in turn supplied the industrial plants.

VII.

With respect to Petitioner's plea that this Court override the District Court's exercise of discretion under Section 17 of the Act by granting against Respondent the blanket injunction which the District Court did not deem warranted, Respondent first calls attention to the facts set forth above which reflect how, in conducting its varied activities, Respondent has endeavored to comply with the Act, and how successfully it has done so. Additional facts of similar nature are set forth below, but at this juncture it appears necessary only to mention that the District Court expressly said and found (R. 76):

> "The court declines to enjoin defendant generally, *finding that defendant has acted in good faith* and that there was room for an honest belief by defendant that the project was not covered. The court does not feel that defendant should act at his peril in connection with all projects in the future."

With these statements and findings having full support in the evidence, surely, under the holding of this Court in *Lublin*, and under the holdings of lower courts in *Mitchell v. Bland*, 241 F. (2d) 808, *Mitchell v. Hodges Contracting Company*, 238 F. (2d) 380, and like cases, the District Court properly exercised its discretion under Section 17 of the Act, and such exercise should not be disturbed by this Court.

ARGUMENT

I.

The Act should be given a liberal construction, and this case should be decided upon the basis of practical considerations rather than technical conceptions. However, liberal construction of a statute does not involve its emasculation or a judicial re-writing thereof, and the test of using practical considerations rather than technical conceptions means nothing if the person espousing it pays only lip service thereto.

Respondent fully agrees with the statement by this Court in *Mitchell v C. W. Vollmer & Co.*, 349 U. S. 427, 75 S. Ct. 860, and in other cases, that the Fair Labor Standards Act is to be accorded a liberal construction. The Court for the Fifth Circuit expressly recognized such principle in its decision of this case (R. 93). However, with full recognition of the principle, that Court also said:

> ". . . we do not understand the Government to contend that the doctrine of liberal construction overrides the court's duty to construe the language of the statute as applied to a particular state of facts in the manner which the court concludes carries out the intent of Congress."

There is, of course, a significant difference between "liberal" construction and a "loose" construction wherein the language of a statute and the intent of those who enacted it, together with applicable canons, are thrown to the four winds in favor of a construction designed to accomplish that which the person construing it thinks it should have accomplished in the first place.

Respondent probably is not as charitable as was the Fifth Circuit, for it seems to Respondent that many of the arguments in Petitioner's Brief come perilously close to asking this Court to make a loose construction of the Act whereby it will be tortured to mean that which the Wage and Hour Division of the Department of Labor thinks it should mean, and whereby it will be treated as if it were written as that agency thinks it should have been written, rather than in the manner in which Congress saw fit to write it. Examples of such an approach by Petitioner to the problems in this case will be pointed out from time to time as the ensuing argument develops.

Certainly it is Respondent's belief that where the language of a federal statute is clear and unambiguous (as is the pertinent language in the instant case) and where the intent and purpose of Congress were plain (as they were here), the statute should be interpreted according to such language, intent and purpose, and should not be sabotaged or subverted to serve another purpose or to satisfy a supposed social policy.

In the instant case, for example, the basic provision of the Act, Section 7(a), provides:

> "Except as otherwise provided in this section no employer shall employ any of his employees who [a] is engaged in commerce, or [b] in the production of goods for commerce for a workweek longer than forty hours, unless [he receives specified overtime compensation]."

The [a] and [b] brackets were inserted in the above quotation to emphasize the obvious fact that, in originally writing the Act, Congress itself distinguished between two separate and distinct types of employees — those engaged *in commerce*, and those engaged *in the production of goods for commerce*. Perhaps, from the standpoint of abstract social policy or otherwise, Congress shouldn't have recognized these two situations and spoken in terms thereof. Perhaps Congress should have lumped together and treated alike all employees whose activities in any way touch commerce, top, side or bottom. However, regardless of what a theorist might think it should have done, the bald fact is that Congress saw fit to recognize and create the above two categories, and that it did so in clear and unambiguous language.

What, then, is to be done? Is a court or administrative agency to follow the statute and recognize the two types of situations, or is it to ignore them and seek to blot them out on the ground that Congress shouldn't have inserted them in the Act in the first place?

As will hereinafter be shown, in 1949 Congress amended the second category—the one dealing with employees engaged "in the production of goods for commerce"—by providing that coverage in that category should obtain under the Act only if two explicitly stated requirements were met. In so acting, Congress did not impose any such requirements with respect to employees in the "in commerce" category.

What should be done in this situation? Should the courts and administrative officials disregard the two types of situations on the ground that the two actually are only one and that Congress should not have declared otherwise? Should they shunt aside the 1949 amendment with the dubious rationalization that they have always interpreted both types of situations in the same manner which the amendment now requires them to treat the second one? In sum, either by disregarding the amendment or by recognizing it but treating it as unnecessary, should the courts and administrative officials read it out of the Act and also otherwise render meaningless the Act's express distinction between situations "in commerce" and those involving employees engaged "in the production of goods for commerce?"

It would almost seem as if such questions answer themselves in the mere asking thereof; yet, as will hereinafter be pointed out, Petitioner seemingly is unaware of the proper answers for he determinedly strives to obliterate or blur the distinctions between the two types of situations; he repeatedly insists upon reading into the "production" cases those holdings which this Court has made solely with reference to "in commerce" situations; and where, as in the case of the 1949 amendment, the Act itself requires different treatment of the two situations, Petitioner calls upon this Court to embrace a so-called "liberal construction" by which the amendment would be made nugatory and the two situations would be treated as one.

In addition, Petitioner repeatedly refers to this Court's oft-quoted statement that questions concern-

ing coverage under the Act should be determined upon the basis of practical considerations, rather than technical conceptions. Respondent fully agrees with this principle, but Respondent does not acquiesce in Petitioner's apparent belief that everything he argues is "practical," while everything that Respondent urges is "technical."

Is it "technical" to point out that the Act creates and recognizes the "in commerce" and the "production of goods for commerce" distinction? If such is technical, rather than practical, then the technicality is found in the Act itself, rather than in Respondent's arguments in connection therewith. The same may and should be said with respect to any argument that Respondent's insistence upon fulfillment of the language and intent of the 1949 amendment is "technical" and should therefore be cast aside.

If charges of technicality are to be urged, what is to be said of Petitioner's arguments that the supplying of water under the Act is to be treated differently from any other activity, or than the supplying of anything else, merely because water and not some other substance is involved? What also is to be said of Petitioner's argument and obvious belief that, if he can somehow avoid the label of "new construction" and can get this Court to tag Mathis Dam as an "improvement or replacement," a victory for him at the hands of this Court will surely follow?

Respondent is happy to join Petitioner in urging that this case be decided in an arena of practical

considerations, but Respondent experiences difficulty in perceiving the practicality of most of Petitioner's arguments, or in comprehending Petitioner's repeated charge that Respondent's contentions are mere technical conceptions.

In a case of this kind, it would appear to be somewhat practical, and certainly not unduly technical, to track the language of the Act and the purpose of Congress. Such is what Respondent has done, and proposes to continue doing, in presenting this case.

II. and III.

This is a "production of goods for commerce" case, rather than an "in commerce" case. Hence, it necessarily is governed by the portions of the Act which deal with employees "engaged in the production of goods for commerce" and with decisions construing such portions of the Act.

This is not an "in commerce" case; rather it is wholly an "in the production of goods for commerce" case. Petitioner himself has consistently recognized this in earlier stages of this litigation, since in Paragraphs IV and V of his Complaint (R. 4), he twice alleged only that Respondent's employees were "engaged in the production of goods for interstate commerce," and nowhere has Petitioner alleged or proved that, in building Mathis Dam, Respondent's employees were "in commerce."

The dam on which such employees worked crosses a local stream which is not a tributary to a navigable stream and which, therefore, does not affect

navigation as did the dam and reservoir in *Tobin v. Pennington-Winter Construction Co.*, 198 (F(2d) 334, *cert. denied*, 345 U. S. 915, 73 S. Ct. 494, a case cited and relied upon by Petitioner (P. Br. 42, 593).[9] The facts in that case revealed a comprehensive plan to improve navigation on the Arkansas and Mississippi Rivers, and such facts afford a clear example of "in commerce" activities. No such activities are involved in the case at bar.

Rather, as is stated above, this is purely a "production of goods for commerce" case. Both Courts below agreed upon that, even though they differed in their findings as to coverage (R. 72-73, 93). Respondent's employees actually produced nothing but a dam across a local stream, and it would appear eminently practical, rather than technical, to observe that the dam is stationary and does not move in commerce. Also, in Section 776.20(b) of its regulations, as quoted above, Petitioner's Wage and Hour Division recognized that "the Act's definitions do not, however, include as 'goods' such things as dams."

The portion of the Act which defines those persons who "produce" goods for commerce, Section 3(j), provides:[10]

---

[9] The *Penington-Winters* case and *Schroeder v. Clifton*, 153 F(2d) 385, *cert. denied*, 328 U. S. 858, 66 S. Ct. 1351, are the only cases cited by the parties herein which involve construction activities on or in the vicinity of dams. The *Schroeder* case was briefly mentioned *supra* at p. 20, and both cases are discussed *infra* at pp. 53-54.

[10] Respondent has divided this quotation into two paragraphs for purposes of reference and of clarity. The statute itself contains no such dual paragraphing.

1. ". . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods,

2. "or in any *closely related* process or occupation *directly essential* to the production thereof, in any State."

Since Respondent's employees produced only a dam, and since a dam is not "goods" within the meaning of the Act, it would seem rather obvious that if the Act can possibly be said to comprehend Respondent's employees, it can do so only by virtue of the second paragraph of the above quotation, rather than under the first paragraph.

In earlier stages of this litigation, the statement just made was accepted and acquiesced in by Petitioner without challenge. However, since he has encountered an adverse decision below on the question of coverage, Petitioner has belatedly dredged up two more theories which he is now advancing, tentatively in his Petition for Certiorari (pp. 23-24), and with more temerity in his Brief (pp. 18-19, 60-66).

Upon the asserted analogy afforded by *Warren-Bradshaw Drilling Co. v. Hall*, 124 Fed (2d) 42 (a case which Petitioner did not even cite in the Courts below), Petitioner appears before this Court with the argument that, even though Respondent's employees were not producing goods when they built the dam (since the dam itself admittedly is not "goods")

yet the dam will impound water, some of which eventually will trickle down to industries which use it in producing goods for commerce. *Ergo* says Petitioner, Respondent's employees were actually producing "goods" for commerce after all, since they were producing water while they were building the dam.

After clearing this hurdle to his satisfaction, Petitioner follows with the averment that the "goods" so produced by Respondent's employees, i.e., water, were produced for commerce since, according to him, (1) some of the water so "produced" becomes an "ingredient" in the goods manufactured by those industries in the Corpus Christi area which admittedly produce for commerce; and, also according to Petitioner, (2) some of the water finds its way into trains or trucks which are actually "in commerce," with the result that the water itself is either "in commerce" or is a goods produced for "in commerce" activity under the holding in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 565.

The patent purpose of both of these arguments is to enable Petitioner to squirm out from under the tests of "closely related" and "directly essential" which are contained in the second paragraph of the above definition. In his "ingredient" argument, Petitioner is averring that Respondent's employees were in fact engaged in the *actual* production of goods (water) in commerce under the first paragraph of the above-quoted definition, rather than

being engaged in a related process or occupation under the second paragraph. By his "trains and trucks" argument, Petitioner is either trying to transmute this into an "in commerce" case (which would be utterly contrary to his pleadings in the case and to his prior theories thereof), or he is trying to say that the so-called production of the water is for "in commerce" purposes, and thus that the situation is subsumed under *Alstate*. In either event, Petitioner's purpose is, as stated above, to avoid the force of the tests of "closely related" and "directly essential" which are contained in the second paragraph of the above quoted definition.

Even the most ingenuous man on the street should have no difficulty in discerning that Petitioner's arguments in these respects are highly "technical" and are not at all "practical." In saying that one of Respondent's root-pickers who picked roots out of rocks destined for Mathis Dam was "producing goods (water) for commerce," is Petitioner not being somewhat less practical and considerably more technical than if he faced the facts and frankly conceded that such a worker was, at the very most, only engaged in a "process or occupation" related in a remote degree to the production of goods in the industrial plants in the Corpus Christi area. In interpreting the facts of this case, as well as in reading the Act, there should be no inhibitions against the use of common sense.

The record is undisputed that none of the water impounded by the dam is sold in commerce.[11] More-

[11] The entire record on this point is as follows (R. 36-37):

over, as far as Petitioner's "ingredient" theory is concerned, the whole of the testimony is set forth in a footnote below.[12] As the quotations in the footnote reveal, the District Judge stated that so far as he knew water does not become a part of industrial products in the Corpus Christi area; the sole witness on the subject said likewise; and counsel for Petitioner added an assenting quip. If a decision in this

---

COUNSEL FOR RESPONDENT: "Your Honor, further than that, we don't know of any industries who sell water outside of the State, the water itself.

COUNSEL FOR PETITIONER: "We don't contend that."

[12] To support his contention concerning use of water as an ingredient, Petitioner twice cites (18, 62) a terse collateral remark made by the trial court in its initial order denying the preliminary injunction, which order, of course, is not the final judgment here under review.

The "ingredient" matter, and the District Court's understanding of same, can best be reflected by quoting verbatim the *only* part of the record in which such matter was even alluded to. The lone witness who testified how water is used by industrial plants around Corpus Christi was asked whether it is used in connection with cooling and condensation towers. After such question, the following colloquy ensued (R. 36):

THE COURT: "It [the water] is not part of the product, it is used for cooling towers and so forth.

COUNSEL FOR RESPONDENT: "So far as I know, none of them are part of the product, but—

THE COURT: *"So far as I know, none of them are. Do you know of any that water is part of their product?*

THE WITNESS: *"No, sir.*

THE COURT: *"Any appreciable part of the product?*

THE WITNESS: *"No, sir.*

COUNSEL FOR PETITIONER: "I am sure they try to keep it out of their petroleum products."

case is to be confined to the record herein, and if it is not to be assumed that the District Judge took judicial knowledge of that which he himself said he didn't know, then the record itself should be sufficient to dispose of Petitioner's ingredient theory."[13]

Petitioner's theory that the water actually became a part of an "in commerce" movement is deserving of no greater consideration. As is said above, the water impounded by Mathis Dam admittedly is never sold in interstate commerce (R. 36-37). If, nevertheless, the water is deemed to have been "in comerce" because of the holding in the *Alstate* case, apt indeed are the remarks of Justices Douglas and Frankfurter in that case that "the circle" of coverage has become "amazingly large." As is hereafter shown, the facts pertaining to any alleged production of water by Respondent's employees for use "in commerce" are far more remote than the facts involved in *Alstate*. Long prior to the 1949 amendment hereinafter referred to, this Court said and held in *McLeod v. Threlkeld*, 319 U.S. 491 at 497, 63 S. Ct. 1248 at 1251, that:

---

[13] Petitioner admits that "the evidence relating to this ground of coverage was not developed in the record of the instant case" (P. Br. 66, fn. 38), but he states that such a record was developed in a pending Illinois case, and he blithely refers this Court to that record for reference, excerpting therefrom (*id.*). Certainly the precepts of Blackstone, Marshall and other giants of our jurisprudence have not so far faded that Respondent should be called upon to account for a record in an Illinois case which it had no hand in preparing and the contents of which are utterly unknown to it.

> "The test under this present act, to determine whether an employee is engaged *in commerce* is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or *so closely related to the movement of the commerce as to be part of it.*"

Hence, regardless of whether the test of *McLeod v. Threlkeld* or the tests of the 1949 amendment are employed to measure the nexus between the activities of Respondent's employees and commerce, the requisite tie is lacking and this is true even if the distinction between "in commerce" and "production of goods for commerce" situations is wholly blurred, as Petitioner seeks to do.

In his brief, Petitioner undertakes to flush so many hares from the brush at the same time, and to scurry them in so many divergent directions, that it is difficult to shoot at one without yielding to the temptation to aim at others. In the foregoing comments, Respondent has digressed to make mention of Petitioner's belated "ingredient" and "trains and trucks" arguments; but, getting back on target, Respondent now once again reiterates its belief that the Court of Appeals for the Fifth Circuit was eminently correct when it pinpointed the issues in this case as follows (R. 93):

> "The Secretary concedes that the construction workers were not engaged 'in commerce.' If, therefore, his views are to prevail it must be on the basis of their being engaged 'in the production of goods for commerce.' Since obviously

> they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed 'in [a] closely related process or occupation directly essential to the production' of goods," *H. B. Zachry Co. v. Mitchell* 262 F(2d) 546 at 548-549.

Hence, Respondent will now focus attention upon the "closely related" and "directly essential" tests of the Act.

IV.

The activities of Respondent's employees in building Mathis Dam were not "closely related" and "directly essential" to the production of goods for commerce. Therefore, the activities of such employees were not covered by the Act.

Prior to 1949, the definition portion of the Act provided that employees were covered if they worked on the actual production of goods for commerce:

> "or in any process or occupation *necessary* to the production thereof, in any State."

Thus, under the Act as then written, anything in the chain of causation which was necessary for the production of goods for commerce was covered by the Act.

As is shown in the Statement of the House Managers who handled the Conference Committee Report on the 1949 amendment, the members of Congress who drafted the amendment first deleted the word "necessary" and inserted requirements that the process or occupation be "closely related" and "indispensable" to production. Subsequently, the word "indispensable" was omitted and the words "directly essential" were substituted therefor."[14] The effect of these changes was, according to the authors thereof, to narrow the coverage of the Act and to remove therefrom numerous local activities which had theretofore been ruled subject to the Act.

In the regulations quoted near the beginning of this Brief, the Wage and Hour Division has also interpreted the 1949 amendment as being intended to narrow the scope of coverage in production for commerce cases, saying in that respect, Section 776.17(a):

> "The legislative history shows that the new language in the final clause of Section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on' goods for commerce) whose coverage under the Act formerly depended on whether their work was 'necessary' to the production of goods for commerce. *Some employees whose work might meet the 'necessary' test are now outside*

[14] For the House Managers' exact remarks, see Appendix *infra*.

the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production . . ."

Seemingly, the effect of the 1949 amendment first came before a Court of Appeals in *Juarez v. Kennecott Copper Corporation*, 225 F(2d) 100, a Tenth Circuit case. That Court said:

> "Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these arose prior to the amendment of Section 203 (j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods, or *in any closely related process or occupation* directly essential to the production thereof, in any State.' We think it is clear from the legislative history that this amendment was to restrict coverage with respect to such employees."

The question next came before the Sixth Circuit in *Mitchell v. Moore*, 241 F(2d) 249, and that Court said:

> "The cases cited above which are particularly relied upon by appellant were decided prior to the 1949 amendment of Section 3(j) of the Act. At that time the statutory definition of 'production of goods' included working in any process or occupation 'necessary to the production thereof.' The amendment reworded that portion of the section so as to read 'working . . . in

> any '*closely related* process or occupation *directly essential* to the production thereof . . .' [italics added by the Court] Before the amendment, coverage under the Act was held by the courts to include a number of situations where work, although related or necessary to the production of the goods under consideration was not directly essential to such production [citing cases]. *It was the purpose of the 1949 amendment to remove such cases from coverage under the Act.* In order for coverage to exist, the amendment requires a closer and more direct relationship to the producing activities than existed in such cases."

Likewise, in *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, the Seventh Circuit said:

> "We agree . . . that Congress intended the amendment to restrict coverage from that indicated by some of the earlier court decisions."

Hence, in deciding the instant case, the Fifth Circuit was but following the decisions of at least three other Circuits when it said (R. 96):[15]

> "In connection with this language it must be further recognized that the amendment of 1949 made even more restrictive the definition of production of goods for commerce by changing the word 'necessary' to the term 'directly essential,' and by adding also the words 'closely related' to modify the word 'occupation.' Reference need not be made to Committee reports

[15] The Fifth Circuit had earlier recognized the restrictive nature of the amendment in *Mitchell v. Jaffe*, 261 F (2d) 883.

> or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was to add rather than detract from the class of employees to be considered engaged in local enterprises."

As the Courts recognized in all of these decisions, the terms "closely related" and "directly essential," as used in the Act, have a definite meaning with respect to the chain of causation which conjoins a particular activity and a particular goods that is produced for commerce, and the effect of those requirements is to serve to lessen the number of links to which coverage is applicable. Even under the old "necessary" test, this Court recognized in *10 East 40th Street Bldg., Inc. v. Callus*, 325 U. S. 578, 65 S. Ct. 1127, that:

> ". . . merely because an occupation is indispensable in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act . . . Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line."

Petitioner repeatedly tries to deprecate the application of the *Callus* case to a situation such as the one at bar, stating that the Fifth Circuit erred in following the reasoning of such case (P. Br. 16, 53-55). If the Fifth Circuit so erred, then the Tenth,

Sixth and Seventh Circuits have likewise erred since, in the decisions cited above, each of those Courts also leaned heavily upon the *Callus* case in deciding what was and was not "closely related" and "directly essential to the production of goods for commerce."

In the *Callus* case, this Court said that the activity there involved:

> "*is too many steps removed* from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act."

Exactly the same thing is true in the case at bar—the activities of Respondent's employees were "too many steps removed from the physical process of the production of goods" for coverage to obtain.

In *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 1116, this Court said that the:

> "problem is, of course, one of drawing lines, but it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn."

While fixed points are lacking,[16] numerous authorities lend aid in drawing the line, among which are:

---

[16] In Section 776.17 of its regulations (see the Appendix *infra*), the Labor Department itself recognized that "No precise line of inclusion or exclusion may be drawn."

(a) In the aforementioned Conference Committee Report concerning the 1949 amendment, the Committee gave specific examples of prior decisions which in effect were overturned by the amendment because of its restriction on coverage. One such specific example was *Schroeder v. Clifton*, 153 F(2d) 385, *cert. denied*, 328 U. S. 858, 66 S. Ct. 1351. In that case, the employees quarried rock and transported it to a site where a dike was being constructed. The dike would serve as a dam and would prevent wells which produced oil for commerce from being flooded. The activities of the employees who built the dike in that case were at least as essential and as related to the production of goods for commerce as were the activities of Respondent's employees in the instant case, yet the Conference Committe stated in plain words that the Labor Department and the Courts would no longer be able to hold the Act applicable in cases where the facts were similar to those in the *Schroeder* case, since such activities would not meet the "closely related" and "directly essential" tests. If the *Schroeder* situation is no longer covered by the Act, then most certainly it should not be held that the case at bar is so covered.

It is here that the case of *Tobin v. Pennington-Winter Construction Co.*, 198 F(2d) 334, *cert. denied*, 345 U. S. 915, 73 S. Ct. 494, is also to be contrasted. In finding coverage in that case, a divided Court held:

> "The construction of this dam is no more than improvement of an existing project for the con-

trol of floods and the betterment of navigation . . .

> "They [the projects involved] are no more than an addition to, or an improvement of, *an existing instrumentality of interstate commerce.*"

The *Pennington-Winter* case was, therefore, an "in commerce" case of the type not governed by the "closely related" and "directly essential" tests which were written into the Act with respect to production cases. As was pointed out above by quotation from the decision in *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, in "in commerce" cases the courts have included employees whose activities, while not in the actual stream of commerce, were so intimately connected therewith as to be for all practical purposes a part of commerce itself. Such were the dam workers in *Pennington-Winter*. Contrariwise, in the instant case, the problem is to appraise the status of workers on a dam who admittedly were not "in commerce" or so intimately connected therewith as to be for all practical purposes a part thereof, but who are covered, if at all, only by the thin shred which connects them with the production of goods by other workers in distant areas.

(b) Another case which the Conference Committee said would no longer represent the law is *McComb v. Super-A Fertilizer Works*, 165 F. (2d) 824, where coverage had been held for employees of a fertilizer company which sold all of its fertilizer to farmers for use in sugar cane fields, with the cane thereafter being processed into raw sugar and sold in commerce.

The Conference Committee explicitely said that such a situation will no longer be covered since it does not meet the tests of the 1949 amendment. Is the causal connection between the work of Respondent's employees on Mathis Dam and the production of goods for commerce in Corpus Christi any less remote or any more susceptible to the tests of the amendment?

(c) Also akin is *Mitchell v Moore*, 241 F. (2d) 249, where the employees were engaged in manufacturing and processing livestock and poultry feed which was fed to animals and fowls that were sold and shipped in commerce. With appreciation of the limiting effect of the 1949 amendment, the Court held that close relationship and direct essentiality were lacking and that the employees were not covered. If, as held by the Court, remoteness was there present, is there not like remoteness in the case at bar?

(d) The same observations can also be made with respect to the "hospital cases," *Juarez v. Kennecott Copper Corporation*, 225 F. (2d) 100, and *Huke v. Ancilla Domini Sisters*, 267 F. (2d) 96, where the providing of hospital and medical care for workers directly engaged in the actual production of goods was held too remote for coverage.

(e) Another aid in drawing the line is afforded by this Court's logic in the *Callus* case, and especially in the distinction which the Court there made between its holding in that case and its holding in *Borden Co. v Borella*, 326 U. S. 679, 65 S. Ct. 1223, and *Kirschbaum v. Walling*, 316 U. S. 517 62 S. Ct. 116. In the latter two cases, coverage was found

for employees in two buildings which were owned and occupied for the primary purpose of serving commerce. On the other hand, in the *Callus* case this Court held that coverage did not exist in the case of an office building used generally by a diverse number of tenants in various kinds of businesses, including a few whose businesses were related to commerce.

In so holding, the Court said:

> ". . . an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts."

Precisely parallel reasoning is applicable here. If Respondent had built a dam which was to be used for the sole or primary purpose of impounding water for a concern or concerns engaged in the production of goods for commerce, it could with force be argued that Respondent's employees were covered since the dam, like the buildings in the *Kirschbaum* and *Borden* cases, *supra*, would be intended to have, and would have, basic use in the production of goods for commerce.

However, the Mathis Dam is not such a dam, for it was not designed primarily to furnish water for industries producing goods for commerce. Rather it,

like the office building in the *Callus* case, was intended to serve and does serve a miscellany of water customers—residential, commercial, institutional, and municipal, as well as industrial (R. 32). The District Judge aptly described the purpose of the Dam when he said (R. 33-34):

> "Well, I think that it is admitted that the dam is to get adequate water supply, not only for Corpus Christi, but for the whole area . . . that is the advertised purpose, and we voted for it, to get an adequate water supply for this area, for our yards, our homes, our industries and other people that needed it, not only in the town, but in this area here."

To track and paraphrase this Court's language in the *Callus* case, a dam so intended for serving the usual miscellany of water users "has many differences in the practical affairs of life" from a dam intended to serve solely or primarily those engaged in the production of goods for commerce, "and the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts." [17]

(f) Additional aids in drawing the line are afforded by the regulations of the Wage and Hour Division which are quoted above and are set forth

---

[17] The analysis of the *Kirschbaum, Borden* and *Callus* cases which the Seventh Circuit made in its opinion in *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, states at more length what Respondent has just tried to say concerning those cases.

in greater detail in the Appendix hereto. Among the factors there set forth as subjects for consideration in determining the relationship and essentiality of a particular activity are:

(i) Where, when and how the activity is performed in relation to the production to which it pertains.

(ii) Whether the activity is performed within or without the productive enterprise.

(iii) Whether its performance is with the primary view of aiding production, or is for some different purpose.

(iv) How immediate or delayed is the activity's effect on production.

(v) The number and nature of any intervening operations or processes between the activity and the production.

(vi) And, in an appropriate case, the characteristics and purposes of the employer's business.

The effects of a consideration of these factors are obvious. In his brief, Petitioner has scoffed at Respondent's mention of the fact that the activities of the employees at Mathis Dam were 42 miles distant as a matter or geography, and several contracts distant as a matter of contractual connection, from the actual production of goods in Corpus Christi. According to Petitioner, these are "technical conceptions," deserving of no consideration (P. Br. 17-18,

56-60). In so arguing, Petitioner runs counter to his own regulations which say that "place" of performance of the activity is to be considered and he also disregards this Court's statement in the *Callus* case that "remoteness of a particular occupation from the physical process is a relevant factor in drawing the line." Most certainly, remoteness in geography and in contractual connection are not decisive in this case, yet they are indeed relevant factors.

It will be most difficult for Petitioner to deny that each and every one of the above factors, contained and set forth in his own regulations, points to a decision of non-coverage in this case. Respondent is not in the business of producing goods for commerce; the activities of Respondent's employees were performed outside, rather than in, any productive enterprise. Such activities were not performed for the primary purpose of aiding industries which produce goods for commerce; rather, they were performed to aid in furnishing water to all residents of the Corpus Christi area, of which the producing industries form only a segment. The activities had no immediate effect on the production of goods for commerce. Rather, such activities affect the production of goods only in the remote sense that, long after the activities were performed, production of goods is aided when a factory worker takes a drink of water or puts water in a boiler or cooling tower. Finally there are indeed a large number of intervening operations or processes between the activities performed by Respondent's employees and the eventual production of goods.

(g) All of these matters lead to one final consideration which is most practical and non-technical, to-wit: If remoteness is not present in the situation at bar, when, if at all, can remoteness—lack of close relationship and of direct esentiality—ever exist in a situation involving and supplying water, some of which winds up being used by producers of goods for commerce? If coverage exists in this case, then in connection with the supplying of water where, if at all, can the required line ever be drawn?

As is said above, the terms "closely related" and "directly essential" must mean something with respect to the chain of causation, and their meaning can only serve to lessen, rather than increase, the number of links in the chain to which coverage is applicable. If Petitioner is correct in his contentions, then in connection with the supplying of water the entire causal chain is covered, and the terms so deliberately inserted into the Act by the 1949 amendment are rendered meaningless.

In this connection, it should not pass unnoticed that Petitioner seems to feel that some magic lies in the fact that water, rather than some other substance, is involved in this case. Is such a view practical, or is it not merely another of Petitioner's technical conceptions? Insofar as the tests of close relationship and direct essentiality are concerned, is water to be treated any differently than the feed involved in *Mitchell v. Moore* or the medical care involved in the hospital cases, *supra?* Does water stand in any higher status under the Act than feed or other substances?

If water is involved, is there never any situation in which this Court will say, as it did in the *Callus* case, that the activity in question "is too many steps removed from the physical process of the production of goods"? The two cases involving the supplying of water which Petitioner repeatedly cites (P. Br. 47-48, 50, 60)[18] were both decided prior to the 1949 amendment; and, in both cases, the activities of the employees were far more closely related and directly essential to the production of goods than were the activities of Respondent's workers, since the employees in those cases were maintaining the irrigation ditches and actually watering crops grown for commerce. In addition, the actual question at issue in those cases was whether the irrigation company employees were exempt from the Act as agricultural workers or as employees of a service establishment.

Most definitely, those cases do not establish that water, merely because it is water, has some character of exalted status which removes it from the drawing of the line required with respect to other substances; and, if water stands in any special position, it will have to be so placed by something other than the language of the Act.

V.

The cases principally relied upon by Petitioner are "in commerce" cases wherein the courts

---

[18] *Reynolds v. Salt River Valley Water Users Ass'n.*, 143 F(2d) 863, *cert. denied*, 323 U.S. 764, 65 S. Ct. 117; *McComb v. Farmers Reservoir & Irrigation Co.*, 167 F(2d) 911, *aff'd*, 337 U.S. 755, 69 S. Ct. 1274.

have not been called upon to apply the tests of "closely related" and "directly essential." Although the "in commerce" cases and the principles uttered therein may find certain application herein, they are not decisive on the question of whether the construction of Mathis Dam meets such tests.

As is said above in the Summary of Argument, a case by case analysis of the dozens of decisions cited by Petitioner would unduly extend this brief and would be wholly unnecessary since Petitioner actually relies on very few cases. Respondent has already mentioned his reliance upon *Tobin v. Pennington-Winter Construction Co.*, 198 F. (2d) 334, *cert. denied*, 345 U.S. 915, 73 S. Ct. 494. The decisions of this Court upon which Petitioner mainly relies are *Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 75 S. Ct. 860; *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 656; and *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 79 S. Ct. 260.

At the outset of any analysis of these cases, note should be taken of the fact that all are 'in commerce" cases, *Vollmer*, *Lublin*, and *Pennington-Winter* being clearly so, and *Alstate* being an "in commerce" case involving an interstate highway, although production features were also present.[19] To call these "in

[19] Even the production features of *Alstate* were unlike those in the instant case since the employer in that case was engaged in *actually mining and producing* the amesite which was being used "in commerce" on interstate roads, rather than merely being engaged in a process or occupation which, as a matter of causation, was related in some degree to the actual mining and production.

commerce" cases, as Respondent has done throughout this litigation, and as did the Fifth Circuit, is not to disparage them or to say that they are inapplicable to the case at bar.

Rather, Respondent has labelled these as "in commerce" cases for several reasons of clarity and convenience. As has perhaps been stated too often herein, the Act itself makes a distinction between "in commerce" situations and "production of goods" situations. Since the 1949 amendment, that distinction has been accentuated by the fact that the "closely related" and "directly essential requirements were written into the law applicable to the latter type of situation, whereas no comparable language in the Act governs the former. In neither *Vollmer*, *Alstate* nor *Lublin*, therefore, did this Court pass upon, or have occasion to pass upon, the effect of the requirements of the 1949 amendment. With that being true, it cannot be accepted as gospel that whatever Petitioner or anyone else might read into this Court's rulings in those three "in commerce" cases must be, or should be, deemed applicable to production of goods cases generally, or, in particular, to a production of goods case such as the one at bar in which need for interpretation and application of the "closely related" and "directly essential" tests is squarely before the Court.

Certainly, it would seem that the language in those cases concerning liberal construction of the Act and the use of practical considerations rather than technical conceptions is, and should be, applicable to all types of cases arising under the Act,

whether or not they are "in commerce" cases. Respondent has so accepted such language and has endeavored to analyze and submit this case in light thereof.

Certainly, also, full recognition must be had of this Court's holding in the *Vollmer* case and of its subsequent statement in the *Lublin* case concerning the supposed "new construction" doctrine. Perhaps when this Court referred in *Lublin* to "whatever vitality the 'new construction' doctrine retains after" *Vollmer* and *Gileo*,[20] it was merely softening the obsequies of a doctrine that is already wholly deceased. On the other hand, *Vollmer*, *Gileo* and *Lublin* were all "in commerce" cases, and in *Vollmer* the Court distinguished its holding therein from its earlier acceptance of the new construction doctrine in *Murphey v. Reed*, 335 U. S. 865, 69 S. Ct. 105, on the ground that the new construction work held exempt in the latter case was "not the improvement of a facility or instrumentality of inter-state commerce."

Perhaps, therefore, this Court's rejection of the new construction doctrine applies only to cases "in commerce," and has no application to situations such as those in *Murphey v. Reed* and in the case at bar which do not involve the improvement of a facility or instrumentality of interstate commerce. In deciding the instant case, the Fifth Circuit so intimated, with an apparent eye to what this Court held

---

[20] *Southern Pacific Co. v. Gileo*, 351 U. S. 493, 76 S. Ct. 952.

in *Murphy v. Reed* and to what this Court said about such holding in *Vollmer* (R. 96-97). In view of the latter two cases, it cannot be said that the logic of the Fifth Circuit was without substance.

In any event, the facts concerning the location of Mathis Dam and its relationship to the "old dam" are undisputed and speak for themselves. Perhaps it is true, as Petitioner so vigorously maintains in one of his several castigations of the Fifth Circuit, that calling the building of Mathis Dam "new construction" would avail Respondent naught. On the other hand, labelling the Dam an "improvement or replacement" also solves nothing, unless this case is to be decided by name tags, rather than by practical considerations.

As is said above in Respondent's Statement, the District Judge probably was correct when he said that Mathis Dam is "at once an improvement, a rebuilding and a new construction." The problem at hand cannot be avoided or solved merely by affixing one or the other of those names to the Dam. Rather, the nature of the Dam and of its construction is significant only as it affords aid in determing whether the requisites of "closely related" and "directly essential" are met.

Even in the "in commerce" cases in which the new construction doctrine clearly no longer exists, this Court must still continue to determine whether any type of construction, be it new or otherwise, falls within the test stated in *McLeod v. Threlkeld, supra,*

by being "so closely related to the movement of the commerce as to be a part of it," and there still is before the Court the vexing problem of doing what Mr. Justice Stewart called in *Lublin* "deciding on which side of the shadowy line between such decisions as *McLeod v. Threlkeld* . . . and *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 1248," even an "in commerce" case falls.

Both in applying the tests of the 1949 amendment in "production of goods" cases and in locating the "shadowy line" in "in commerce" cases, practical considerations rather than technical labels should be paramount, and the practical considerations pertinent in this case have been spelled out in foregoing portions of this brief, especially in Subdivision IV, *supra*.

VI.

The two "Chambers cases" are neither applicable nor controlling in this case.

In seeking certiorari, Petitioner asserted a conflict between the decision of the Fifth Circuit herein and the decisions of the Eighth and Tenth Circuits in the so-called *Chambers* cases, *Mitchell v. Chambers Construction Company*, 214 Fed (2d) 515, and *Chambers Construction Company v. Mitchell*, 233 Fed (2d) 717, and he continues to cite and rely heavily upon those cases in his brief. Neither of the *Chambers* cases should be deemed applicable or controlling herein.

In the first case, by the Eighth Circuit, the question of coverage was not decided and, while affirming on other grounds the refusal of the district court to grant an injunction, the Court merely said that it was "inclined to agree" with the Secretary's contentions on coverage.

In the second case, as stated by the Court of Appeals herein (R.98), the Court "equated the new construction of facilities to be used for production of goods," without recognizing the two different bases of coverage and without any application to the latter situation of the tests of "closely related" and "directly essential" activities. In other words, that Court embraced Petitioner's contention that merely labelling something an "improvement or replacement" is enough to insure coverage, and that such a label suffices even though the case might be a production case rather than an "in commerce" one.

Moreover, the facts in the two *Chambers* cases are distinguishable from those at bar since both involved construction done on *water distribution systems*, rather than on facilities which result in the impounding of water that ultimately reaches a distribution system. As a result, the employees' activities in the *Chambers* cases pertained to the actual distribution of water to industrial plants, whereas in the instant case the building of Mathis Dam was far removed from the distribution systems of the City of Corpus Christi, and was even further removed from the delivery of water to industrial plants by the distribution systems. In addition, the construction

contracts in those cases were with the cities which owned the distribution systems, and the work was directly performed for them, whereas in the instant case the construction contract was with the Nueces Water District, and the building of the dam for the District was only in an indirect sense work done on behalf of the City which owned the distribution systems that in turn supplied the usual miscellany of city water customers, including industrial plants in and around Corpus Christi.

VII.

If coverage was present in this case, the District Court properly exercised its discretion with respect to the scope of the injunction, and such exercise should not be disturbed.

In this case, the District Court found coverage, but, in the exercise of the discretion which it plainly possesses, limited the injunction that it granted to the Mathis Dam project, rather than granting a blanket injunction pertaining to all of Respondent's activities.

In the Court of Appeals, Petitioner Secretary of Labor filed a cross-appeal complaining of the scope of the injunction. Since that Court held that no coverage existed, Petitioner's cross-appeal never came to decision.

However, in this Court Petitioner also is contending that, if coverage is found, this Court should override the discretion vested in the trial court and

grant a blanket injunction. Again, this Court's recent decision in *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 212, 79 S. Ct. is pertinent for, even though the Court there held that coverage existed (contrary to the holding in both courts below), the Court said that, upon its reversal and remand:

> "it will still be within the discretion of the District Court whether or not to issue an injunction,"

citing *Mitchell v. Bland*, 241 F. (2d) 808, wherein the Court held that the trial court:

> "would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles."

Prior to this latter decision, the Court which decided it had had before it in *Mitchell v. Hodges Contracting Company*, 238 F. (2d) 380, a situation in which a construction company had completed over 1,100 jobs, with payrolls in excess of $300,000. Out of those 1,100 jobs, the Wage and Hour Division had questioned only five. The trial court found that coverage existed in three of the five jobs, but denied the injunction. In affirming such denial, the Court of Appeals reviewed established principles pertaining to the discretion of the trial courts in matters of this kind, and then said:

> "There was, first, the acknowledged fact that, as a general contractor doing miscellaneous construction work, coverage for this employer was

a shifting thing dependent upon the nature of the jobs being performed."

Certainly, that is true in the case at bar. Respondent is a general contractor doing many different types of jobs throughout the Nation.

The Court next said:

> "Despite a lengthy investigation, analysis revealed that in the two-year period and out of over 1,100 contract jobs, only five were questioned. Out of payrolls totaling in excess of $300,000 for this period, only small amounts of disputed overtime were involved."

Let us see how the facts in the instant case compare. Respondent has done approximately 1,200 construction jobs of varying kinds, with varying problems of coverage (R. 63). The value of these jobs has been "in excess of three hundred million dollars" (R. 63).

Despite this volume of work and the varying problems of coverage, Respondent has been involved in court proceedings under the Fair Labor Standards Act only two times—in the case at bar and in a case in New Mexico some years ago where a complicated question of coverage was also involved, *Mitchell v. Zachry*, 127 F. Supp. 377 (R. 63).[21]

[21] In that case, although finding coverage, the Court prefaced its opinion with the statement that "The question is an extremely close one, in the Court's opinion," 127 F. Supp. 377 at 380.

At no time has Respondent ever been sued by an employee for any alleged violation of the Act (R. 63-64). As is shown in Respondent's Statement above, during the three years immediately prior to the trial hereof, Respondent had a total of 185 jobs, and it concluded that 178 of them, or 96.2% of the total, were covered by the Act.

Respondent necessarily bids on a great number of jobs in the course of its business (a far greater number than it obtains), and consistently seeks opinions from its legal department concerning coverage. The legal department is composed of four attorneys, two of whom are on this brief (R. 64-65). Respondent also has in its employ a man whose chief duties are to police jobs for compliance with labor laws, and to meet with the regional attorney for the Labor Department in Dallas, Texas, as well as with attorneys for the Labor Department in Washington, concerning the various Federal wage and hour laws. It was and is the practice and intention of Respondent in the past, present and future to comply with the provisions of the Fair Labor Standards Act whenever it is applicable (R. 65).

Respondent is engaged generally in the construction business and, in such, does all sorts of work. It cannot well be compared with a single business where only one or two types of activities are customarily and continually carried on, and where a single ruling on coverage would hold good until Congress changed the law. In the construction industry, the question of coverage is not so static. Rather, cover-

age can and does vary from job to job, and even on jobs in close proximity.

Notwithstanding this aspect of Respondent's business, and notwithstanding all of the above-stated precautions which Respondent takes to avoid any infraction of the Act in its operations, Petitioner seeks a broad, unlimited injunction in order to be able, in his own words, to enforce immediate payment or "restoration of under-payments resulting from *future* violations," by use of contempt proceedings (P. Br. 70). Petitioner thus by his own admission desires to use the injunctive procedure primarly as a summary method of collecting underpayments of wages, and he thus seeks to accomplish indirectly that which Congress specifically removed from his jurisdiction by enactment of the present provisions of Section 217 of the Act.

However, regardless of Petitioner's motives, the record does not in any event justify more than the limited injunction granted by the District Court. Respondent was not happy to see even such a limited injunction granted, but it recognizes that, having found coverage, the trial court acted within its discretion in granting such an injunction, and that it was keeping in mind the admonition that "there is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction."[22]

---

[22] *Kent Products, Inc. v. Hoegh*, 245 Iowa 205, 61 N.W. (2d) 711; *Van Name v. Federal Deposit Insurance Corp.*, 130 N.J. Eq. 433, 23 A(2d) 261, *aff'd* 132 N.J. Eq. 302, 28 A(2d) 210, *Trisolini v. Meltsner*, 23 N.J. 204, 92 A(2d) 832.

Most certainly, the facts do not reveal that Respondent is a habitual violator of the Act, or that it flaunts the Act or intentionally violates it. Under such circumstances, the trial court could well have denied any injunction at all, but in the exercise of its discretion, it saw fit to grant a limited injunction. Clearly it had this discretionary power, and, under the principles announced by decisions of this Court, the exercise of such power should not be disturbed by any decision herein.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. If, however, such judgment should be reversed, the judgment of the District Court as to the scope of the injunction should not be disturbed and should be affirmed.

Respectfully submitted,

ALLEN WOOD
Petroleum Tower
Corpus Christi, Texas

SIDNEY D. CALLENDER
CHESTER H. JOHNSON
Transit Tower
San Antonio, Texas

R. DEAN MOORHEAD
First Federal Building
Austin, Texas

OF COUNSEL:

CHESTER H. JOHNSON

R. DEAN MOORHEAD

APPENDIX

Legislative History

The following are pertinent parts of statement of the managers on the part of the House covering the 1949 amendment to the Fair Labor Standards Act of 1938. U. S. Code Congressional Service, 81st Congress, 1st session, Pages 2253-54.

Produced.—The House bill amended the definition of "produced" in section 3(j) by inserting the words "closely related" before the words "process or occupation" and substituting the word "indispensable" for the word "necessary". The Senate amendment left the definition of "produced" as contained in the present law unchanged. The bill as agreed to in conference follows the House bill except that the words "directly essential" are substituted for the word "indispensable".

Coverage under the act for a large category of employees is determined by the definition of the term "produced". The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee "producing, manufacturing, mining, handling, transporting, or in any other manner working on * * * goods." Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees engaged in maintenance clerical, or custodial work. The second part of the present definition, covering any employee engaged in "any process or occupation necessary to the production" of

goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredient of the goods produced by any of their customers (McComb v. Deibert (E. D. Pa. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the act has also been extended to employees of an indepedently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N D. Ohio 1948).

Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (Kirschbaum v. Walling, 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods, for commerce, will remain subject to the act. All employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.

The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugarcane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State (McComb, Administrator v. Super-A Fertilizer Works, 165 F. (2d) 824 (C.C.A.1)).

2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil

for commerce from being flooded (Schroeder v. Clifton, 153 F. (2d) 385 (C.C.A. 10); cert. den., 328 U. S. 858).

3. Employees of a local window-cleaning company doing business wholly within the State, but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce (Martino v. Michigan Window Cleaning Company, 327 U. S. 173; reh'g den., 327 U. S. 816.)

4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in the producing goods for interstate commerce (1944-45 W. H. Man., p. 125).

5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., pp. 138-139).

6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 C. C. H., Labor Law Reporter, 4th Ed., No. 25,150,385).

All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory

workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

Regulations Involved

Various portions of the interpretative bulletin refered to above are as follows, same being extracts from Part 776, Tit. 29, Labor c. V, Wage and Hour Division, Department of Labor, Sections 776.0 to 776.30 of the Code of Federal Regulations, as amended:

ENGAGING IN THE PRODUCTION OF GOODS FOR COMMERCE

Section 776.14. Elements of "production coverage:

Sections 6 and 7 of the act, as has been noted, cover not only employees who are engaged "in commerce" as explained above, but also "each" and "any" employee who is engaged in the "production" of "goods" for "commerce". What employees are so engaged can be determined only by reference to the very comprehensive definitions which Congress has supplied to make clear what is meant by "production," by "goods," and by "commerce" as those words are used in sections 6 and 7. In the light of these definitions, there are three interrelated elements of coverage to be considered in determining whether an employee is engaged in the production of goods for commerce: (a) There must be "production"; (b) such production must be of "goods"; (c) such production of goods must

be "for commerce"; all within the meaning of the act. The three elements of "production" coverage are discussed in order in the sections following."

Section 776.17. Employment in a "closely related process or occupation directly essential to" production of goods—(a) coverage in general:

Employees who are not actually "producing * * * or in any other manner working on" goods for comerce are, nevertheless, engaged in the "production" of such goods within the meaning of the act and therefore within its general coverage if they are employed "in any closely related process or occupation directly essential to the production thereof, in any State." Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged "in any process or occupation necessary to the production" of goods for commerce. The amendments deleted the word "necessary" and substituted the words "closely related" and "directly essential" contained in the present law. The words "directly essential" were adopted by the Conference Committee in lieu of the word "indispensable" contained in the amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is both "closely related" and "directly essential" to the production of goods for interstate or foreign commerce.

The legislative history shows that the new language in the final clause of section 3(j) of the act is intended to narrow, and to provide a more precise guide to, the scope of its coverage

with respect to employees (engaged neither "in commerce" nor in actually "producing or in any other manner working on" goods for commerce) whose coverage under the act formerly depended on whether their work was "necessary" to the production of goods for commerce. Some employees whose work might meet the "necessary" test are now outside the coverage of the act because their work is not "closely related" and "directly essential" to such production, others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.

The scope of coverage under the "closely related" and "directly essential" language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language, this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier "necessary" test. However, while the coverage or noncoverage of many employees may be determined with reasonable certainty, no precise line for inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.

(b) Meaning of "closely related" and "directly essential". The terms "closely related" and "directly essential" are not susceptible of precise definition; as used in the act they together describe a situation in which; under all

the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce (1) which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.

Not all activities that are "closely related" to production will be "directly essential" to it, nor will all activities "directly essential" to production meet the "closely related" test. For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work "closely related" to such production, but some such employees may be outside the coverage of the act because their work is not "directly essential" to production of the goods. (For a discussion of this point and specific illustrations, see section 776.18(b).). Similarly, there are some situations in which an employee performing work "directly essential" to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them "closely related" to the productive activities of another. (For a

more detailed discussion and specific illustrations, see section 776.19).

(c) *Determining whether activities are "closely related" and "directly essential".* (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words "directly essential" refer only to the relationship of the employee's work to production. Work "directly essential" to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand, that the criteria for determining whether a process or occupation is "closely related" to production cannot be limited to those which show its closeness in terms of need or function. It may also be important to ascertain for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purpose with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise. (Examples of the application of these principles may be found in section 776.18 and 776.19).

(2) The determination of whether an activity is closely or only related to production may thus involve consideration of such factors, among

others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view of aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employers business. Moreover, in some cases where particular work "directly essential" to production is performed by an employer other than the producer, the degree of such essentiality may be a significant factor in determining whether the work is also "closely related" to such production. (See section 776.19).

No one of the factors listed above is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite "close and immediate tie" to the production of goods for interstate or foreign commerce. It is the sum of the factors relavant to each case that determines whether the particular activity is "closely related" to such production.

The application of these principles is further explained and illustrated in section 776.18 and 776.19.

(3) In determining whether an activity is "directly essential" to production, a practical judgment is required as to whether, in terms of the function and need of such activity in successful production operations, it is "essential" and "directly" so to such operations. There are questions of degree; even "directly" essential activities (for example, machinery repair, custodial, and clerical work in a producing plant) (for other examples, see section 776.18(a) and 776.19) will vary in degree of their essentiality and in the directness of the aid which they provide to production. An activity may be "directly essential" without being indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new factory itself, are not "directly" essential. An activity which provides something essential to meet the immediate needs of production, as, for example, the manufacture of articles like machinery or tools or dies for use in production of goods for commerce (see section 776.19(b)) will, however, be no less "directly" essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.

Section 776.20(b). The Act's definitions do not, however, include as 'goods' such things as dams, river improvements, highways and viaducts, or railroad lines.